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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 95-20
Computer III Further Remand	)	
Proceedings: Bell Operating	)	
Company Provision of Enhanced	)	DOCKET FILE COPY ORIGINAL
Services	)	

REPLY COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

The Commercial Internet eXchange Association ("CIX"), by its attorneys, files these reply comments to express its strong support for structural separation requirements. The evidence presented in the comments demonstrates that anticompetitive conduct by the Bell Operating Companies ("BOCs") is alive and well, to the detriment of the independent enhanced service industry and the public at large. As the BOCs now emerge in the Internet access business, CIX is greatly concerned that access discrimination will impede the development of the Internet in this country.

DISCUSSION

I. The Case for Structural Separations is Compelling.

When the BOCs offer integrated, unregulated enhanced services they can and do use their monopoly control over local access to exclude enhanced service competitors. CIX's comments in this proceeding, while supporting structural separations, emphasized the need for strong nonstructural separations to control BOC monopoly practices. In light of the economic theory and real world experience presented in others' comments, CIX is now more convinced that structural separations, in conjunction with nonstructural safeguards, are needed to ensure a vibrant, competitive enhanced services marketplace.

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The Hatfield Associates' economic analysis of BOC service offerings in the absence of structural separations and the BOCs' network deployment decisions demonstrates that anticompetitive conduct is an economic and strategic decision. CIX can confirm the analysis of the Hatfield Associates study that enhanced service providers ("ESPs") are almost wholly dependent on the BOCs for access to their customers.[1] According to the study, the BOCs have failed to provide ESPs with access to features of the modern local network, such as SS7, IN, and ISDN, that are critical for competition with the BOC.[2] Hatfield Associates also demonstrates how the BOCs' effectively perpetuate this access discrimination through strategic deployment of basic network features.[3] Based on analysis of market conditions, Hatfield Associates concludes that the economic costs of eliminating structural separation, in terms of anticompetitive behavior and government enforcement, far outweigh any theoretical benefits.[4] CIX concurs.

The experience of independent market participants provides real world proof that BOC anticompetitive conduct and access discrimination has occurred in the past and is an on-going problem. The fact that *all* non-BOC providers in this proceeding argue for structural separations is itself evidence that access discrimination is a widespread industry problem. In addition, the comments of MCI, Compuserve, ITAA, and ATSI provided a litany of cases of BOC access discrimination and anti-competitive conduct.[5] The record shows that the current environment,

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1 "ONA: A Promise Not Realized -- Reprise," Hatfield Associates, Inc., CC Docket No. 95-20, at 4 (filed April 7, 1995).

2 Id., at 17 - 28.

3 Id., at 34 - 36.

4 Id., at 51 - 54.

5 Comments of MCI, CC Docket No. 95-20, at 33 - 38 (filed April 10, 1995) (catalogue of BOC anti-competitive abuses); Comments of Compuserve, Inc., CC Docket No. 95-20, at 36 - 49 (filed April 7, 1995) (examples of access discrimination); Comments of the Information

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with no structural separation or fundamental unbundling, does not promote fair and open competition.

Further, CIX agrees with the Newspaper Association of America ("NAA") that many of the supposed "marketing" efficiencies from integration are, in fact, a by-product of the BOCs' monopoly on local access. As NAA pointed out, "[c]laims of marketing or service efficiencies should be examined closely to ensure that the 'efficiency' is not merely the opportunity to exploit the BOC's monopoly position with respect to service in order to gain advantage in a peripheral, competitive market . . . the claimed 'cost' of structural separation will be the cost of foregoing an opportunity to enjoy an anticompetitive advantage."[6]

CIX supports structural and nonstructural safeguards working together. Non-structural safeguards alone are an ineffective remedy for the overwhelming advantages the BOCs enjoy in joint marketing and sales of Internet access with basic service over a single advanced transport facility. This marketing advantage is nothing more than the spoils from their position as the dominant providers of basic transport services; the Commission should not encourage it as a public interest benefit. This practice is harmful to the public, because it discourages consumers from making an informed decision on the price and service options that are available through competing providers. Further, this marketing advantage limits the successful penetration of competing providers, thereby inhibiting competitive pricing and discouraging investment in independent research and niche services. In fact, this sort of marketing advantage is no different from the inherent disparity which the Commission has attempted to control for many years

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Technology Association of America, CC Docket No. 95-20, at 48 - 51 (filed April 7, 1995) (examples of access discrimination); Comments of the Association of Telemessaging Services International, Inc., CC Docket No. 95-20, at 6 (filed April 7, 1995).

6 Comments of NAA, CC Docket No. 95-20, at 8-9 (filed April 7, 1995).

through CPNI and CPE safeguards.[7] Respectfully, CIX finds that nonstructural safeguards alone do not achieve the intended effect of a competitive enhanced services market.

While CIX members are fully prepared to compete head-to-head with the BOCs, the Commission cannot expect competition from independent service providers to flourish if the incumbent monopolist has unequal and advantageous access, whether that access is to the basic telecommunications network or to the customer's doorstep.[8]

II. BOCs' Arguments For Integrated Service Offerings Do Not Measure Up To Market Realities.

CIX is confident that other parties will provide a comprehensive refutation of the BOCs' various arguments against structural separations. CIX will comment here on several arguments posited by various BOCs that simply do not pertain to the Internet access market, and so fail to support the BOCs' argument that nonstructural safeguards alone will ensure a competitive market.

First, several BOCs hold up voicemail as the exemplary market to show that BOC-integrated services do not lead to anticompetitive results.[9] While CIX cannot gauge the BOCs'

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7 Report and Order, 6 FCC Rcd. 7571, 7611 - 7614 (1991) (CPNI restrictions), modified, California v. FCC, 39 F.3d 919 (9th Cir. 1994); Report and Order, 2 FCC Rcd. 143 (1987) (restrictions on marketing of CPE), decision clarified in part, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd. 22 (1987), aff'd, Illinois Tel. Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989).

8 See also Comments of the Ad Hoc Telecommunications Users Group, CC Docket No. 95-20, at 10 (filed April 7, 1995) (Joint marketing of BOC basic and enhanced services places other ESPs at a competitive disadvantage); Comments of the Information Technology Association of America, CC Docket No. 95-20, at 13 (filed April 7, 1995) (structural separations minimize the opportunities for arbitrary and improper cost allocation of joint marketing expenses).

9 Amended Comments of US West, CC Docket No. 95-20, at 4 (filed April 10, 1995); Comments of BellSouth Telecommunications, CC Docket No. 95-20, at 55 (filed April 7,

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effect on that market, CIX does know that the voicemail business has very little in common with Internet access, and the lessons learned in that market cannot be transposed onto the emerging Internet access market. As Southwestern Bell points out, the voicemail market represents a mere 7% of the entire enhanced services marketplace;[10] there is no plausible reason to use it as the measure by which to evaluate the effect BOC entry into the many diverse enhanced services markets. Moreover, the conditions found in the voicemail market are entirely distinct from the from Internet access market. With very different market conditions, the BOC offerings will likely have very different market consequences.

Even if the voicemail market was catalyzed by the BOC voicemail services, the Internet access has had a much more broad based, competitive upbringing. Internet access is neither a multi-billion dollar business[11] nor is it dominated by vast telecom conglomerates, as evidenced by the CIX membership of 80 domestic providers. The BOCs integrated service offerings are likely to overwhelm this growing industry.

In addition, the BOCs' contention that other competitive providers can function as substitutes for the local wired loop are entirely speculative.[12] As CIX explained in its comments, competitive access providers do not begin to offer the level of ubiquitous access or residential

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1995); Comments of Bell Atlantic, CC Docket No. 95-20, at 2, 7 (filed April 7, 1995); Jerry A. Hausman and Timothy J. Tardiff, "Benefits and Costs of Vertical Integration of Basic and Enhanced Telecommunications Services," at 3 (dated April 6, 1995).

10 Comments of Southwestern Bell CC Docket No. 95-20, at 8.

11 See e.g., Maloff Co. 1994 - 1995 Internet Access Provider's Marketplace Analysis, "The State of the Internet Access Marketplace - January, 1995," at 7 (February , 1995) (estimates that top ten Internet access providers (excluding information providers) have aggregate 1994 revenues of $165.15 million and $659.41 million (including information providers)).

12 Comments of Pacific Bell and Nevada Bell, at 4, 27-48 (filed April 7, 1995); Comments of Ameritech, CC Docket No. 95-20, at 5 (filed April 7, 1995); Comments of Bell Atlantic CC Docket No. 95-20, at 19 (filed April 7, 1995).

access that the BOC network provides. In terms of PCS and wireless access, the Commission has not even licensed the broadband PCS MTA applicants of the auctioned licenses,[13] and these parties have not begun the task of system build-out. The prospects for cable television as a competitor to the local loop are equally speculative and have yet to reach the market. It is impossible to base a finding on vibrant competition for ubiquitous local transport when no such competitors presently exist.

Finally, some BOCs argue that structural separations are unnecessary to ensure a competitive marketplace, vaguely citing the "convergence" of technologies.[14] CIX believes that the convergence of technologies provides the BOCs with more opportunity for discrimination and cross-subsidy, not less. Advanced transport technologies have the capacity to deliver a multitude of service offerings over a single facility, leaving critical issues of cross-subsidy to difficult cost-allocation studies and debates.[15] Further, the explosive rate of change in technologies makes it more difficult for regulators and competing ESPs to ensure that BOC network design and deployment decisions are made consistent with equal access goals. Ameritech's claim that "information service suppliers and their customers will be able to choose

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13 See FCC Public Notice, "Personal Communications Service Information," Rpt. No. CW-95-3 (May 15, 1995) (pending petitions to deny all auction A/B license applications).

14 See Comments of Ameritech, CC Docket No. 95-20, at 5-8 (filed April 7, 1995); Amended Comments of US West, CC Docket No. 95-20, at 6-7 (filed April 10, 1995).

15 As recently as last week, the Commission determined that several BOCs had misallocated costs for expanded interconnection rates, resulting in unreasonable changes for BOC competitors. Report and Order, CC Dkt. No. 94-97, FCC 95-200 (released May 11, 1995). Ironically, the BOCs in this proceeding have pointed to expanded interconnection as a safeguard against access discrimination. See, e.g., Comments of Pacific Bell and Nevada Bell, CC Docket No. 95-20, at 56-57 (filed April 7, 1995); NYNEX Comments, CC Docket No. 95-20, at 16 (filed April 7, 1995).

among a widening variety of distribution . . . for enhanced services"[16] simply does not match the reality that the BOCs continue to dominate these advanced distribution means.

In fact, Ameritech is currently leveraging its resources and control over the distribution facilities to impair the Internet access market in Michigan. The Ameritech Advanced Data Services ("AADS") plan[17] will connect schools, libraries and community colleges to its Internet access service at deep discounts. Participating educational institutions are eligible for free CPE (modems and routers), free installation, and additional 18 month discounts beyond the AADS discounted rates for educational institutions. While CIX applauds technology contributions to schools, it finds that the AADS program excludes competitive Internet access providers. Because schools must connect to the Ameritech access service in order to get the free CPE and free installation, competing providers have no opportunity to offer service to this significant segment of the market.

Plans like AADS[18] will exclude competing Internet access providers at the local level.[19] CIX doubts that Ameritech's Internet access service is self-sustaining when it offers free services

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16 Comments of Ameritech, CC Docket No. 95-20, at 6 (filed April 7, 1995).

17 See, Ameritech Michigan, Case No. U-8987, M.P.S.C., 1994 Mich. PSC LEXIS 322, *10 - *14 (December 16, 1994) (description of some aspects of the plan).

18 Under the "Opportunity Indiana" plan, Ameritech is relieved of much Indiana state rate regulation, and, in return, has agreed to build a $120 million dollar digital and fiber-optic network linking "every interested school, hospital and major government center in [Indiana Bell's] service area." Indiana Bell Telephone Company, Cause No. 39705, I.U.R.C., 1994 PUC LEXIS 250, Appendix, section 10 of Settlement Agreement (June 30, 1994). In addition, Ameritech will provide $30 million dollars of donations to non-profit corporations, selected at Ameritech's "sole discretion," for the funding of school "terminal equipment, hardware, applications software and training." Id. CIX believes that Ameritech will offer Internet access service in conjunction with this plan and thereby gain a significant competitive advantage.

19 The Michigan plan will apparently allow end-users to choose from more than one inter-LATA Internet access provider. However, it is unclear whether customers will be able to

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and deeply discounted rates, especially given that Ameritech currently has no market presence in Internet access from which it could absorb such a costly price-cutting scheme. CIX does know that competitive providers simply cannot afford to run their business in such a manner. As competing providers leave the market as a result of such plans, the BOCs have no market incentive to upgrade their Internet access services, to tailor their services to the changing needs of the educational and government end-users, or to maintain prices at competitive levels. In contrast, if the BOCs were required to offer its Internet access through a separate subsidiary, and assuming Ameritech offers comparably efficient interconnection on the advanced networks, competition could continue to flourish.

III. ONA/CEI Requirements Complement Structural Separations And Should Be Retained In All Cases.

CIX believes that requiring structural separations does not in any way diminish the positive public policy need for ONA and CEI. To the contrary, ONA and CEI complement a structural separations environment. ONA ensures that competitors will have access to the BOCs' unbundled network elements. CEI offers the opportunity for FCC and public review of the BOC's enhanced service offering to ensure that its emergence into a new market is consistent with the Commission's "equal access" policies. Structural separations inhibits BOCs from cross-subsidizing and discriminating when it is a market participant in enhanced services. Each of these goals fortifies "equal access" which, in turn, promotes a robust and competitive enhanced services market.

For example, suppose that Ameritech offers its Internet access services through a separate subsidiary. Without ONA (and a strong CEI review process), the independent Internet service

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choose from all competing providers, or only the ones that Ameritech decides to interconnect with.

providers competing with Ameritech have no way to gain access to either (1) the network elements used by the Ameritech separate subsidiary (as would be required under CEI) or (2) the other unbundled elements that independent ISPs could use to form a more efficient, or niche, service offering different from the Ameritech separate subsidiary. Therefore, both separate subsidiaries and ONA/CEI together are necessary to fulfill the Commission's public interest obligation in "equal access" and an efficient communications network "with adequate facilities at reasonable charges."[20]

This position is fully consistent with the Commission's 1990 ONA Remand Order. After notice and comment, the Commission concluded that "we should require the BOCs to implement ONA regardless of our ultimate decision on the appropriate safeguards for BOC provision of enhanced services."[21] Specifically, the Commission determined that ONA served the public interest in a way that is completely independent from its role as a nonstructural safeguard to anticompetitive conduct:

> A major goal of ONA is to increase opportunities for ESPs to use the BOCs' regulated networks in highly efficient ways, enabling them to expand their markets for their present services, and develop new offerings as well, all to the benefit of consumers . . . promotion of efficient use of the network is one of the primary goals of the Communications Act.[22]

CIX wholeheartedly agrees with this vision of ONA, in concert with structural separation.

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20 47 U.S.C. §152(a).

21 In the Matter of Computer III Remand Proceedings, Report and Order, 5 FCC Rcd. 7719, 7720 (1990) ("ONA Remand Order"), aff'd, California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

22 Id.

CONCLUSION

For the foregoing reasons, CIX strongly supports those commenters that argue for structural separations. Pending telecommunications legislation confirms that structural separations is not a relic of the past, it is a necessary safeguard to ensure competitive enhanced services markets. Safeguards that ensure an unbundled basic network, in addition to structural separations, will optimize the prospects for a truly competitive Internet access market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Catherine C. Ennels, a secretary for the law firm of Piper & Marbury L.L.P., hereby certify that on this 19th day of May, 1995, a copy of the "Reply Comments of the Commercial Internet eXchange Association" was served via hand delivery upon the following :

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In addition, the original and nine copies of the "Reply Comments of the Commercial Internet eXchange Association" were filed this day via hand delivery upon William F. Caton, Acting Secretary, Federal Communications Commission, 1919 M Street, Room 222, Washington, D.C. 20554, and copies of the same were served this day via U.S. mail, first-class and postage paid, on the following parties:

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